

AMENDMENTS THE FEDERAL RULES OF APPELLATE
PROCEDURE

COMMUNICATION

FROM

THE CHIEF JUSTICE, THE SUPREME
COURT OF THE UNITED STATES

TRANSMITTING

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCE-
DURE THAT HAVE BEEN ADOPTED BY THE SUPREME COURT,
PURSUANT TO 28 U.S.C. 2074.



APRIL 21, 2009.—Referred to the Committee on the Judiciary and ordered
to be printed

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WASHINGTON : 2009

SUPREME COURT OF THE UNITED STATES,
Washington, DC, March 25, 2009.

Hon. NANCY PELOSI,
Speaker of the House of Representatives,
Washington, DC.

DEAR MADAM SPEAKER: I have the honor to submit to the Congress the amendments to the Federal Rules of Appellate Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States code.

Sincerely,

JOHN G. ROBERTS, JR.,
Chief Justice.

March 26, 2009

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Appellate Procedure be, and they hereby are, amended by including therein amendments to Appellate Rules 4, 5, 6, 10, 12, 15, 19, 22, 25, 26, 27, 28.1, 30, 31, 39, and 41, and new Rule 12.1.

[See infra., pp. — — —.]

2. That the foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 2009, and shall govern in all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

**AMENDMENTS TO THE FEDERAL
RULES OF APPELLATE PROCEDURE**

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

* * * * *

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

- (i) for judgment under Rule 50(b);
- (ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

- (ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal — in compliance with Rule 3(c) — within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(5) Motion for Extension of Time.

* * * * *

- (C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

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- (i) the entry of either the judgment or the order being appealed; or
- (ii) the filing of the government's notice of appeal.

* * * * *

(3) Effect of a Motion on a Notice of Appeal.

- (A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 14 days after the entry of the order disposing of the last such remaining motion, or within 14 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

* * * * *

**(d) Grant of Permission; Fees; Cost Bond; Filing
the Record.**

(1) Within 14 days after the entry of the order
granting permission to appeal, the appellant
must:

- (A) pay the district clerk all required fees; and
- (B) file a cost bond if required under Rule 7.

* * * * *

**Rule 6. Appeal in a Bankruptcy Case From a Final
Judgment, Order, or Decree of a District Court or
Bankruptcy Appellate Panel**

* * * * *

**(b) Appeal From a Judgment, Order, or Decree of a
District Court or Bankruptcy Appellate Panel
Exercising Appellate Jurisdiction in a
Bankruptcy Case.**

* * * * *

FEDERAL RULES OF APPELLATE PROCEDURE 9

the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included.

* * * * *

Rule 10. The Record on Appeal

* * * * *

(b) The Transcript of Proceedings.

- (1) **Appellant's Duty to Order.** Within 14 days after filing the notice of appeal or entry of an order disposing of the last timely remaining motion of a type specified in Rule 4(a)(4)(A), whichever is later, the appellant must do either of the following:

* * * * *

- (3) **Partial Transcript.** Unless the entire transcript is ordered:

days either order the parts or move in the district court for an order requiring the appellant to do so.

* * * * *

- (c) **Statement of the Evidence When the Proceedings Were Not Recorded or When a Transcript Is Unavailable.** If the transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appellee, who may serve objections or proposed amendments within 14 days after being served. The statement and any objections or proposed amendments must then be submitted to the district court for settlement and approval. As settled

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authority to grant because of an appeal that has been docketed and is pending, the movant must promptly notify the circuit clerk if the district court states either that it would grant the motion or that the motion raises a substantial issue.

- (b) Remand After an Indicative Ruling.** If the district court states that it would grant the motion or that the motion raises a substantial issue, the court of appeals may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal. If the court of appeals remands but retains jurisdiction, the parties must promptly notify the circuit clerk when the district court has decided the motion on remand.

FEDERAL RULES OF APPELLATE PROCEDURE 15

other party a proposed judgment conforming to the opinion. A party who disagrees with the agency's proposed judgment must within 10 days file with the clerk and serve the agency with a proposed judgment that the party believes conforms to the opinion. The court will settle the judgment and direct entry without further hearing or argument.

Rule 22. Habeas Corpus and Section 2255 Proceedings

* * * * *

(b) Certificate of Appealability.

- (1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under

(B) **A brief or appendix.** A brief or appendix is timely filed, however, if on or before the last day for filing, it is:

- (i) mailed to the clerk by First-Class Mail, or other class of mail that is at least as expeditious, postage prepaid; or
- (ii) dispatched to a third-party commercial carrier for delivery to the clerk within 3 days.

* * * * *

(c) Manner of Service.

- (1) Service may be any of the following:

* * * * *

(C) by third-party commercial carrier for delivery within 3 days; or

* * * * *

FEDERAL RULES OF APPELLATE PROCEDURE 19

(2) **Period Stated in Hours.** When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) **Inaccessibility of the Clerk's Office.** Unless the court orders otherwise, if the clerk's office is inaccessible:

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(C) for filing under Rules 4(c)(1), 25(a)(2)(B), and 25(a)(2)(C) — and filing by mail under Rule 13(b) — at the latest time for the method chosen for delivery to the post office, third-party commercial carrier, or prison mailing system; and

(D) for filing by other means, when the clerk's office is scheduled to close.

(5) **“Next Day” Defined.** The “next day” is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) **“Legal Holiday” Defined.** “Legal holiday” means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial

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For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

Rule 27. Motions**(a) In General.**

* * * * *

(3) Response.

(A) Time to file. Any party may file a response to a motion; Rule 27(a)(2) governs its contents. The response must be filed within 10 days after service of the motion unless the court shortens or extends the time. A motion authorized by Rules 8, 9, 18, or 41 may be granted before the 10-day period runs only if the court gives reasonable notice to the parties that it intends to act sooner.

Rule 30. Appendix to the Briefs

* * * * *

(b) All Parties' Responsibilities.**(1) Determining the Contents of the Appendix.**

The parties are encouraged to agree on the contents of the appendix. In the absence of an agreement, the appellant must, within 14 days after the record is filed, serve on the appellee a designation of the parts of the record the appellant intends to include in the appendix and a statement of the issues the appellant intends to present for review. The appellee may, within 14 days after receiving the designation, serve on the appellant a designation of additional parts to which it wishes to direct the court's attention. The appellant must include the designated parts in the appendix. The parties must not engage in

Rule 39. Costs

* * * * *

(d) Bill of Costs: Objections; Insertion in Mandate.

* * * * *

- (2) Objections must be filed within 14 days after service of the bill of costs, unless the court extends the time.

* * * * *

Rule 41. Mandate: Contents; Issuance and Effective Date; Stay

* * * * *

- (b) When Issued.** The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate,



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

November 26, 2008

MEMORANDUM

To: The Chief Justice of the United States and the Associate Justices of the Supreme Court

From: James C. Duff *James C. Duff*

RE: TRANSMITTAL OF PROPOSED AMENDMENT TO THE FEDERAL RULES OF APPELLATE PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court proposed amendments to Rules 4, 5, 6, 10, 12, 15, 19, 22, 25, 26, 27, 28.1, 30, 31, 39, and 41, and new Rule 12.1 of the Federal Rules of Appellate Procedure, which were approved by the Judicial Conference at its September 2008 session. The Judicial Conference recommends that the amendments and new rule be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendments and new rule, I am transmitting an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference as well as the Report of the Advisory Committee on the Federal Rules of Appellate Procedure.

Attachments

**EXCERPT FROM THE
REPORT OF THE JUDICIAL CONFERENCE**

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

**TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES:**

* * * * *

TIME-COMPUTATION PROJECT

In consultation with the Committee's Time-Computation Subcommittee, the Appellate, Bankruptcy, Civil, and Criminal Rules Advisory Committees proposed amendments to Appellate Rule 26, Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rule 45 to make the method of computing time consistent, simpler, and clearer. In tandem with this work, each advisory rules committee also reviewed and proposed changes to the time periods in all the rules to ensure that every deadline is reasonable and that changing the time-computation method did not have the effect of shortening existing time periods.

The time-computation project was launched in response to frequent complaints about the time, energy, and anxiety expended in calculating time periods, the potential for error, and the anomalous results of the current computation provisions.

Proposed Rules Changes

The principal simplifying change in the amended time-computation rules is the adoption of a "days-are-days" approach to computing all time periods. Under some of the current rules, intermediate weekends and holidays are omitted when computing short periods but included when computing longer periods. By contrast, under the proposed rules amendments, intermediate weekends and holidays are counted regardless of the length of the specified period.

Other changes in the amended time-computation rules clarify how to count forward when the period measured is after an event (for example, 21 days after service of a motion) and the

committees' comprehensive review of time-computation rules and the rules containing time periods resulted in proposed amendments to a total of 91 rules.

In August 2007, proposed amendments to each set of rules were published for comment from the bench and bar. Scheduled public hearings on the amendments were canceled because no one asked to testify. The specific proposed amendments are discussed later in this report in the respective sections describing the advisory committees' recommendations.

* * * * *

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 4, 22, and 26(c), and new Rule 12.1 with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed changes were circulated to the bench and bar for comment in August 2007. The scheduled public hearings on the proposed changes were canceled because no one requested to testify.

The proposed amendment to Rule 4(a)(4) eliminates an ambiguity arising from the 1998 restyling of the rule, which might be construed to require an appellant to amend a notice of appeal filed before a district court amends the judgment, even if the amendment favors the appellant.

Proposed new Rule 12.1, which is coordinated with proposed new Civil Rule 62.1, provides a clearly stated and consistent procedure for a party to request an "indicative ruling" on a motion that the district court lacks authority to grant because of a pending appeal. Many courts follow a variation of this practice but there is no clear or consistent statement in the rules. The proposed new appellate rule facilitates the remand to the district court for a ruling on the motion when the district court has indicated that it would grant the motion if the court of appeals

that they be approved and transmitted to the Judicial Conference. The proposed amendment to Rule 26 simplifies and clarifies the general time-computation method. The proposed amendments to the listed rules adjust time periods consistent with the change to the time-computation method.

The proposed adjustments to the time periods in the rules are minor — accounting for the inclusion of holidays and weekends in the time-computation method and the preference for stating periods in multiples of seven days — with some exceptions noted below. The following adjustments are proposed:

- References to “calendar days” in Rules 25, 26, and 41 become simply references to “days,” consistent with the change to the time-computation method.
- Three and five days are extended to seven days in Rules 27, 28.1, and 31.
- Seven and eight days are extended to 10 days in Rules 5(b)(2), 19, and 27.
- Seven and 10 days are extended to 14 days in Rules 4(a)(5), 4(a)(6), 4(b), 5(d)(1), 6, 10, 12, 30, and 39. The seven-day time period in Rule 4, which governs motions to reopen the time to appeal, is increased to 14 days. As noted above with respect to the recommendations concerning statutory deadlines, the advisory committee suggested choosing 14 days as opposed to 10 days in keeping with the time-computation project’s preference for stating periods that are multiples of seven days. Lengthening the time period to 14 days would not unduly threaten any principle of repose; a party that wished to be confident about the expiration of appeal time could protect itself by giving notice of the judgment to other parties.
- Ten days are extended to 28 days in Rule 4(a)(4)(A)(vi). The provision delineates which motions under Civil Rule 60 have the effect under Appellate Rule 4(a)(4)(A) of extending the time to file an appeal. The proposed change in Appellate Rule

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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ROBERT L. HINKLE
EVIDENCE RULES

TO: Judge Lee H. Rosenthal, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Carl E. Stewart, Chair
Advisory Committee on Appellate Rules

DATE: May 13, 2008 (revised June 20, 2008)

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on April 10 and 11 in Monterey, California. The Committee gave final approval to the package of time-computation amendments, to one new rule, and to three other proposed amendments.

* * * * *

Part II.A of this report discusses the proposals for which the Committee seeks final approval: the time-computation amendments, proposed new Rule 12.1, and amendments to Rules 26(c), 4(a)(4)(B)(ii) and 22.

* * * * *

drafting error. Section 1453 should be amended to set the time limit at “not more than 10 days” to correct the drafting error and offset the shift in the time-computation method.

- The four-day deadlines in the Classified Information Procedures Act (“CIPA”) § 7(b) and in the material-support statute, 18 U.S.C. § 2339B(f)(5)(B), should be amended to specify that intermediate weekends and holidays are excluded.
 - CIPA § 7(b) sets a 10-day deadline for pretrial appeals relating to orders concerning disclosure of classified information, and sets 4-day deadlines for the court of appeals to hear argument and render decision with respect to appeals taken during trial. 18 U.S.C. § 2339B(f)(5)(B) sets 10-day and 4-day deadlines (similar to those in CIPA § 7(b)) relating to certain appeals of orders concerning classified information in civil actions brought by the United States concerning the provision of material support to foreign terrorist organizations.
 - Concerning the 10-day deadlines in CIPA and the material-support statute, the Committee voted to defer to the views of the Criminal Rules Committee.
- The 10-day mandamus petition deadline in the Crime Victims’ Rights Act (“CVRA”), 18 U.S.C. § 3771(d)(5), should be extended to 14 days.
 - 18 U.S.C. § 3771(d)(5) sets a 10-day time period for victims to seek mandamus review in the court of appeals for certain purposes. 18 U.S.C. § 3771(d)(3) sets a 72-hour deadline for the court of appeals to decide a victim’s mandamus petition and a 5-day limit on continuances in the district court.
 - The Committee does not recommend any changes to the 72-hour or 5-day periods in the CVRA.

b. Text of Proposed Amendments and Committee Notes (on next page)

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- 14 ~~— (4) As used in this rule, “legal holiday” means New~~
15 ~~Year’s Day, Martin Luther King, Jr.’s Birthday,~~
16 ~~Washington’s Birthday, Memorial Day, Independence~~
17 ~~Day, Labor Day, Columbus Day, Veterans’ Day,~~
18 ~~Thanksgiving Day, Christmas Day, and any other day~~
19 ~~declared a holiday by the President, Congress, or the~~
20 ~~state in which is located either the district court that~~
21 ~~rendered the challenged judgment or order, or the circuit~~
22 ~~clerk’s principal office. The following rules apply in~~
23 ~~computing any time period specified in these rules, in~~
24 ~~any local rule or court order, or in any statute that does~~
25 ~~not specify a method of computing time.~~
- 26 **(1) Period Stated in Days or a Longer Unit. When**
27 **the period is stated in days or a longer unit of time:**
28 **(A) exclude the day of the event that triggers the**
29 **period;**

4 FEDERAL RULES OF APPELLATE PROCEDURE

47 to run until the same time on the next day that
48 is not a Saturday, Sunday, or legal holiday.

49 (3) **Inaccessibility of the Clerk's Office.** Unless the
50 court orders otherwise, if the clerk's office is
51 inaccessible:

52 (A) on the last day for filing under Rule 26(a)(1),
53 then the time for filing is extended to the first
54 accessible day that is not a Saturday, Sunday,
55 or legal holiday; or

56 (B) during the last hour for filing under Rule
57 26(a)(2), then the time for filing is extended
58 to the same time on the first accessible day
59 that is not a Saturday, Sunday, or legal
60 holiday.

61 (4) **"Last Day" Defined.** Unless a different time is
62 set by a statute, local rule, or court order, the last
63 day ends:

6 FEDERAL RULES OF APPELLATE PROCEDURE

81 (6) “Legal Holiday” Defined. “Legal holiday”

82 means:

83 (A) the day set aside by statute for observing New

84 Year’s Day, Martin Luther King Jr.’s

85 Birthday, Washington’s Birthday, Memorial

86 Day, Independence Day, Labor Day,

87 Columbus Day, Veterans’ Day, Thanksgiving

88 Day, or Christmas Day;

89 (B) any day declared a holiday by the President or

90 Congress; and

91 (C) for periods that are measured after an event,

92 any other day declared a holiday by the state

93 where either of the following is located: the

94 district court that rendered the challenged

95 judgment or order, or the circuit clerk’s

96 principal office.

97 * * * * *

time periods that are stated in weeks, months, or years; though no such time period currently appears in the Federal Rules of Appellate Procedure, such periods may be set by other covered provisions such as a local rule. *See, e.g.*, Third Circuit Local Appellate Rule 46.3(c)(1). Subdivision (a)(1)(B)’s directive to “count every day” is relevant only if the period is stated in days (not weeks, months or years).

Under former Rule 26(a), a period of 11 days or more was computed differently than a period of less than 11 days. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 26(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day — and the 10-day period not infrequently ended later than the 14-day period. *See Milimore Sales, Inc. v. Int’l Rectifier, Inc.*, 412 F.3d 685, 686 (6th Cir. 2005).

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days — including intermediate Saturdays, Sundays, and legal holidays — are counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is provided below in the discussion of subdivision (a)(5). Subdivision (a)(3) addresses filing deadlines that expire on a day when the clerk’s office is inaccessible.

Where subdivision (a) formerly referred to the “act, event, or default” that triggers the deadline, new subdivision (a) refers simply to the “event” that triggers the deadline; this change in terminology

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time (2:17 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. Periods stated in hours are not to be “rounded up” to the next whole hour. Subdivision (a)(3) addresses situations when the clerk’s office is inaccessible during the last hour before a filing deadline expires.

Subdivision (a)(2)(B) directs that every hour be counted. Thus, for example, a 72-hour period that commences at 10:00 a.m. on Friday, November 2, 2007, will run until 9:00 a.m. on Monday, November 5; the discrepancy in start and end times in this example results from the intervening shift from daylight saving time to standard time.

Subdivision (a)(3). When determining the last day of a filing period stated in days or a longer unit of time, a day on which the clerk’s office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. When determining the end of a filing period stated in hours, if the clerk’s office is inaccessible during the last hour of the filing period computed under subdivision (a)(2) then the period is extended to the same time on the next day that is not a weekend, holiday or day when the clerk’s office is inaccessible.

Subdivision (a)(3)’s extensions apply “[u]nless the court orders otherwise.” In some circumstances, the court might not wish a period of inaccessibility to trigger a full 24-hour extension; in those instances, the court can specify a briefer extension.

The text of the rule no longer refers to “weather or other conditions” as the reason for the inaccessibility of the clerk’s office. The reference to “weather” was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a

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Subdivision (a)(4)(A) addresses electronic filings in the district court. For example, subdivision (a)(4)(A) would apply to an electronically-filed notice of appeal. Subdivision (a)(4)(B) addresses electronic filings in the court of appeals.

Subdivision (a)(4)(C) addresses filings by mail under Rules 25(a)(2)(B)(i) and 13(b), filings by third-party commercial carrier under Rule 25(a)(2)(B)(ii), and inmate filings under Rules 4(c)(1) and 25(a)(2)(C). For such filings, subdivision (a)(4)(C) provides that the “last day” ends at the latest time (prior to midnight in the filer’s time zone) that the filer can properly submit the filing to the post office, third-party commercial carrier, or prison mail system (as applicable) using the filer’s chosen method of submission. For example, if a correctional institution’s legal mail system’s rules of operation provide that items may only be placed in the mail system between 9:00 a.m. and 5:00 p.m., then the “last day” for filings under Rules 4(c)(1) and 25(a)(2)(C) by inmates in that institution ends at 5:00 p.m. As another example, if a filer uses a drop box maintained by a third-party commercial carrier, the “last day” ends at the time of that drop box’s last scheduled pickup. Filings by mail under Rule 13(b) continue to be subject to § 7502 of the Internal Revenue Code, as amended, and the applicable regulations.

Subdivision (a)(4)(D) addresses all other non-electronic filings; for such filings, the last day ends under (a)(4)(D) when the clerk’s office in which the filing is made is scheduled to close.

Subdivision (a)(5). New subdivision (a)(5) defines the “next” day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of Appellate Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an event. *See, e.g.*, Rule 4(a)(1)(A) (subject to certain exceptions, notice

Rule 4. Appeal as of Right — When Taken

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4 (A) If a party timely files in the district court any
5 of the following motions under the Federal
6 Rules of Civil Procedure, the time to file an

16 FEDERAL RULES OF APPELLATE PROCEDURE

24 * * * * *

25 (5) **Motion for Extension of Time.**

26 * * * * *

27 (C) No extension under this Rule 4(a)(5)
 28 may exceed 30 days after the prescribed
 29 time or ~~10~~ 14 days after the date when
 30 the order granting the motion is entered,
 31 whichever is later.

32 (6) **Reopening the Time to File an Appeal.** The
 33 district court may reopen the time to file an
 34 appeal for a period of 14 days after the date
 35 when its order to reopen is entered, but only
 36 if all the following conditions are satisfied:

37 * * * * *

38 (B) the motion is filed within 180 days after
 39 the judgment or order is entered or
 40 within ~~7~~ 14 days after the moving party

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- 57 (A) If a defendant timely makes any of the
58 following motions under the Federal Rules of
59 Criminal Procedure, the notice of appeal from
60 a judgment of conviction must be filed within
61 ~~10~~ 14 days after the entry of the order
62 disposing of the last such remaining motion,
63 or within ~~10~~ 14 days after the entry of the
64 judgment of conviction, whichever period
65 ends later. This provision applies to a timely
66 motion: Y
- 67 (i) for judgment of acquittal under Rule 29;
68 (ii) for a new trial under Rule 33, but if
69 based on newly discovered evidence,
70 only if the motion is made no later than
71 ~~10~~ 14 days after the entry of the
72 judgment; or
73 (iii) for arrest of judgment under Rule 34.

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14 (B) file a cost bond if required under Rule 7.

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22 FEDERAL RULES OF APPELLATE PROCEDURE

7 (2) **Additional Rules.** In addition to the rules made
8 applicable by Rule 6(b)(1), the following rules
9 apply:

10 * * * * *

11 **(B) The record on appeal.**

12 (i) Within ~~10~~ 14 days after filing the notice
13 of appeal, the appellant must file with
14 the clerk possessing the record
15 assembled in accordance with
16 Bankruptcy Rule 8006 — and serve on
17 the appellee — a statement of the issues
18 to be presented on appeal and a
19 designation of the record to be certified
20 and sent to the circuit clerk.

21 (ii) An appellee who believes that other
22 parts of the record are necessary must,
23 within ~~10~~ 14 days after being served

24 FEDERAL RULES OF APPELLATE PROCEDURE

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(3) **Partial Transcript.** Unless the entire transcript is

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ordered:

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(A) the appellant must — within the ~~10~~ 14 days

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provided in Rule 10(b)(1) — file a statement

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of the issues that the appellant intends to

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present on the appeal and must serve on the

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appellee a copy of both the order or

16

certificate and the statement;

17

(B) if the appellee considers it necessary to have

18

a transcript of other parts of the proceedings,

19

the appellee must, within ~~10~~ 14 days after the

20

service of the order or certificate and the

21

statement of the issues, file and serve on the

22

appellant a designation of additional parts to

23

be ordered; and

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41 proposed amendments must then be submitted to the
 42 district court for settlement and approval. As settled and
 43 approved, the statement must be included by the district
 44 clerk in the record on appeal.

45 * * * * *

Committee Note

Subdivisions (b)(1), (b)(3), and (c). The times set in the former rule at 10 days have been revised to 14 days. See the Note to Rule 26.

Rule 12. Docketing the Appeal; Filing a Representation Statement; Filing the Record

1 * * * * *

2 **(b) Filing a Representation Statement.** Unless the court
 3 of appeals designates another time, the attorney who
 4 filed the notice of appeal must, within ~~10~~ 14 days after
 5 filing the notice, file a statement with the circuit clerk
 6 naming the parties that the attorney represents on appeal.

Committee Note

Subdivision (b)(2). The time set in the former rule at 20 days has been revised to 21 days. See the Note to Rule 26.

Rule 19. Settlement of a Judgment Enforcing an Agency Order in Part

1 When the court files an opinion directing entry of
2 judgment enforcing the agency's order in part, the agency
3 must within 14 days file with the clerk and serve on each
4 other party a proposed judgment conforming to the opinion.
5 A party who disagrees with the agency's proposed judgment
6 must within ~~7~~ 10 days file with the clerk and serve the agency
7 with a proposed judgment that the party believes conforms to
8 the opinion. The court will settle the judgment and direct
9 entry without further hearing or argument.

Committee Note

Rule 19 formerly required a party who disagreed with the agency's proposed judgment to file a proposed judgment "within 7 days." Under former Rule 26(a), "7 days" always meant at least 9

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14 * * * * *

15 (c) **Manner of Service.**

16 (1) Service may be any of the following:

17 * * * * *

18 (C) by third-party commercial carrier for delivery

19 within 3 ~~calendar~~ days; or

20 * * * * *

Committee Note

Under former Rule 26(a), short periods that span weekends or holidays were computed without counting those weekends or holidays. To specify that a period should be calculated by counting all intermediate days, including weekends or holidays, the Rules used the term “calendar days.” Rule 26(a) now takes a “days-are-days” approach under which all intermediate days are counted, no matter how short the period. Accordingly, “3 calendar days” in subdivisions (a)(2)(B)(ii) and (c)(1)(C) is amended to read simply “3 days.”

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Rule 27. Motions1 **(a) In General.**

2 * * * * *

3 **(3) Response.**

4 **(A) Time to file.** Any party may file a response
5 to a motion; Rule 27(a)(2) governs its
6 contents. The response must be filed within 8
7 10 days after service of the motion unless the
8 court shortens or extends the time. A motion
9 authorized by Rules 8, 9, 18, or 41 may be
10 granted before the ~~8-day~~ 10-day period runs
11 only if the court gives reasonable notice to
12 the parties that it intends to act sooner.

13 * * * * *

14 **(4) Reply to Response.** Any reply to a response must
15 be filed within 5 7 days after service of the

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Rule 28.1. Cross-Appeals

1 * * * * *

2 **(f) Time to Serve and File a Brief.** Briefs must be served
3 and filed as follows:

4 * * * * *

5 (4) the appellee's reply brief, within 14 days after the
6 appellant's response and reply brief is served, but
7 at least ~~3~~ 7 days before argument unless the court,
8 for good cause, allows a later filing.

Committee Note

Subdivision (f)(4). Subdivision (f)(4) formerly required that the appellee's reply brief be served "at least 3 days before argument unless the court, for good cause, allows a later filing." Under former Rule 26(a), "3 days" could mean as many as 5 or even 6 days. See the Note to Rule 26. Under revised Rule 26(a), intermediate weekends and holidays are counted. Changing "3 days" to "7 days" alters the period accordingly. Under revised Rule 26(a), when a period ends on a weekend or holiday, one must continue to count in the same direction until the next day that is not a weekend or holiday; the choice of the 7-day period for subdivision (f)(4) will minimize such occurrences.

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17 the record, because the entire record is available to
 18 the court. This paragraph applies also to a
 19 cross-appellant and a cross-appellee.

20 * * * * *

Committee Note

Subdivision (b)(1). The times set in the former rule at 10 days have been revised to 14 days. See the Note to Rule 26.

Rule 31. Serving and Filing Briefs1 **(a) Time to Serve and File a Brief.**

2 (1) The appellant must serve and file a brief within 40
 3 days after the record is filed. The appellee must
 4 serve and file a brief within 30 days after the
 5 appellant's brief is served. The appellant may serve
 6 and file a reply brief within 14 days after service of
 7 the appellee's brief but a reply brief must be filed
 8 at least ~~3~~ 7 days before argument, unless the court,
 9 for good cause, allows a later filing.

Subdivision (d)(2). The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 26.

1 * * * * *

2 **(b) When Issued.** The court's mandate must issue 7

3 ~~calendar~~ days after the time to file a petition for

4 rehearing expires, or 7 ~~calendar~~ days after entry of an

5 order denying a timely petition for panel rehearing,

6 petition for rehearing en banc, or motion for stay of

7 mandate, whichever is later. The court may shorten or

8 extend the time.

9 * * * * *

Under former Rule 26(a), short periods that span weekends or holidays were computed without counting those weekends or holidays. To specify that a period should be calculated by counting all intermediate days, including weekends or holidays, the Rules used

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for tolling motions to 30 days. Because 30 days is also the time period set by Appellate Rule 4 and by 28 U.S.C. § 2107 for taking a civil appeal (when the United States and its officers or agencies are not parties), commentators pointed out that adopting 30 days as the cutoff for filing tolling motions would sometimes place would-be appellants in an awkward position: If the deadline for making a tolling motion falls on the same day as the deadline for filing a notice of appeal, then in a case involving multiple parties on one side, a litigant who wishes to appeal may not know, when filing the notice of appeal, whether a tolling motion will be filed; such a timing system can be expected to produce instances when appeals are filed, only to go into abeyance while the tolling motion is resolved.

By the time of the Appellate Rules Committee's April 2008 meeting, the Civil Rules Committee had discussed this issue and had determined that the best resolution would be to extend the deadline for tolling motions to 28 days rather than 30 days. The choice of a 28-day deadline responds to the concerns of those who feel that the current 10-day deadlines are much too short, but also takes into account the problem of the 30-day appeal deadline. As described in the draft minutes of the Committee's April meeting, Committee members carefully discussed the relevant concerns and determined, by a vote of 7 to 1, to assent to the 28-day time period for tolling motions and to change the cutoff time in Rule 4(a)(4)(A)(vi) to 28 days.

The Standing Committee changed Rule 26(a)(6) to exclude state holidays from the definition of "legal holiday" for purposes of computing backward-counted periods; conforming changes were made to the Committee Note.

* * * * *

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b. Text of Proposed Amendment and Committee Note**Rule 26. Computing and Extending Time**

1 * * * * *

2 **(c) Additional Time After Service.** When a party is
3 ~~required or permitted to act within a prescribed period~~
4 ~~after a paper is served on that party~~ may or must act
5 within a specified time after service, 3 calendar days are
6 added to after the ~~prescribed~~ period would otherwise
7 expire under Rule 26(a), unless the paper is delivered on
8 the date of service stated in the proof of service. For
9 purposes of this Rule 26(c), a paper that is served
10 electronically is not treated as delivered on the date of
11 service stated in the proof of service.

Committee Note

Subdivision (c). Rule 26(c) has been amended to eliminate uncertainty about application of the 3-day rule. Civil Rule 6(e) was amended in 2004 to eliminate similar uncertainty in the Civil Rules.

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Style suggestions. Professor Kimble suggests capitalizing “after” in the subdivision heading; deleting “prescribed” from “prescribed period”; and placing a comma after “under Rule 26(a)”.

3. New Rule 12.1

a. Introduction

The Committee seeks final approval of proposed new Appellate Rule 12.1 concerning indicative rulings. This Rule was published for comment in August along with proposed Civil Rule 62.1. Both rules will formalize (and raise awareness concerning) the practice of indicative rulings.

Committee Note

This new rule corresponds to Federal Rule of Civil Procedure 62.1, which adopts for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party moves under Civil Rule 60(b) to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot grant relief under a rule such as Civil Rule 60(b) without a remand. But it can entertain the motion and deny it, defer consideration, state that it would grant the motion if the court of appeals remands for that purpose, or state that the motion raises a substantial issue. Experienced lawyers often refer to the suggestion for remand as an “indicative ruling.” (Appellate Rule 4(a)(4) lists six motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before or after the motion is filed until the last such motion is disposed of. The district court has authority to grant the motion without resorting to the indicative ruling procedure.)

The procedure formalized by Rule 12.1 is helpful when relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. In the criminal context, the Committee anticipates that Rule 12.1 will be used primarily if not exclusively for newly discovered evidence motions under Criminal Rule 33(b)(1) (see *United States v. Cronin*, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c).

Rule 12.1 does not attempt to define the circumstances in which an appeal limits or defeats the district court’s authority to act in the face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction.

that could have been raised on appeal from the underlying judgment. *See, e.g., Browder v. Dir., Dep't of Corrections of Ill.*, 434 U.S. 257, 263 n.7 (1978) (“[A]n appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review.”). The Committee does not endorse the notion that a court of appeals should decide that the initial appeal was abandoned — despite the absence of any clear statement of intent to abandon the appeal — merely because an unlimited remand occurred, but the possibility that a court might take that troubling view underscores the need for caution in delimiting the scope of the remand.

The court of appeals may instead choose to remand for the sole purpose of ruling on the motion while retaining jurisdiction to proceed with the appeal after the district court rules on the motion (if the appeal is not moot at that point and if any party wishes to proceed). This will often be the preferred course in the light of the concerns expressed above. It is also possible that the court of appeals may wish to proceed to hear the appeal even after the district court has granted relief on remand; thus, even when the district court indicates that it would grant relief, the court of appeals may in appropriate circumstances choose a limited rather than unlimited remand.

If the court of appeals remands but retains jurisdiction, subdivision (b) requires the parties to notify the circuit clerk when the district court has decided the motion on remand. This is a joint obligation that is discharged when the required notice is given by any litigant involved in the motion in the district court.

When relief is sought in the district court during the pendency of an appeal, litigants should bear in mind the likelihood that a new or amended notice of appeal will be necessary in order to challenge the district court’s disposition of the motion. *See, e.g., Jordan v.*

relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. In the criminal context, the Committee anticipates that Rule 12.1's use will be limited to newly discovered evidence motions under Criminal Rule 33(b)(1) (see *United States v. Cronin*, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c).” The Standing Committee further revised the latter sentence to read: “In the criminal context, the Committee anticipates that Rule 12.1 will be used primarily if not exclusively for newly discovered evidence motions under Criminal Rule 33(b)(1) (see *United States v. Cronin*, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c).”

As published for comment, the first sentence of the Note's last paragraph read: “When relief is sought in the district court during the pendency of an appeal, litigants should bear in mind the likelihood that a separate notice of appeal will be necessary in order to challenge the district court's disposition of the motion.” In response to a suggestion by Public Citizen, the Appellate Rules Committee revised this sentence to refer to a “new or amended” notice of appeal rather than a “separate” notice of appeal.

The Appellate Rules Committee, in consultation with the Civil Rules Committee, added the following parenthetical at the end of the Note's first paragraph: “(The effect of a notice of appeal on district-court authority is addressed by Appellate Rule 4(a)(4), which lists six motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before or after the motion is filed until the last such motion is disposed of. The district court has authority to grant the motion without resorting to the indicative ruling procedure.)” This parenthetical is designed to forestall confusion concerning the effect of tolling motions on a district court's power to

4. Rule 4(a)(4)(B)(ii)**a. Introduction**

The Committee seeks final approval for an amendment to Rule 4(a)(4)(B)(ii) that will eliminate an ambiguity that resulted from the 1998 restyling. The Rule's current language might be read to require the appellant to amend a prior notice of appeal if the district court amends the judgment after the notice of appeal is filed, even if the amendment is in the appellant's favor. This ambiguity will be removed by replacing the current reference to challenging "a judgment altered or amended upon" a timely post-trial motion with a reference to challenging "a judgment's alteration or amendment upon" such a motion.

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16 ~~amended~~ judgment's alteration or
 17 amendment upon such a motion, must
 18 file a notice of appeal, or an amended
 19 notice of appeal — in compliance with
 20 Rule 3(c) — within the time prescribed
 21 by this Rule measured from the entry of
 22 the order disposing of the last such
 23 remaining motion.

24 * * * * *

Committee Note

Subdivision (a)(4)(B)(ii). Subdivision (a)(4)(B)(ii) is amended to address problems that stemmed from the adoption — during the 1998 restyling project — of language referring to “a judgment altered or amended upon” a post-trial motion.

Prior to the restyling, subdivision (a)(4) instructed that “[a]ppellate review of an order disposing of any of [the post-trial motions listed in subdivision (a)(4)] requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file a notice, or amended notice, of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding.” After the

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5. Rule 22(b)(1)**a. Introduction**

The Committee seeks final approval of an amendment to Rule 22 that would conform the Appellate Rules to a change that the Criminal Rules Committee proposes to make to the Rules Governing Proceedings Under 28 U.S.C. §§ 2254 or 2255. The Appellate Rules amendment deletes from Rule 22 the requirement that the district judge who rendered the judgment either issue a certificate of appealability (COA) or state why a certificate should not issue. The relevant requirement will be delineated in Rule 11(a) of the Rules Governing Proceedings Under 28 U.S.C. § 2254 or § 2255.

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16 Proceedings Under 28 U.S.C. § 2254 or § 2255 (if
17 any) to the court of appeals, along with the notice
18 of appeal and the file of the district-court
19 proceedings. If the district judge has denied the
20 certificate, the applicant may request a circuit
21 judge to issue ~~the certificate~~ it.
22 * * * * *

Committee Note

Subdivision (b)(1). The requirement that the district judge who rendered the judgment either issue a certificate of appealability or state why a certificate should not issue has been deleted from subdivision (b)(1). Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. § 2254 or § 2255 now delineates the relevant requirement. When an applicant has filed a notice of appeal, the district clerk must transmit the record to the court of appeals; if the district judge has issued a certificate of appealability, the district clerk must include in this transmission the certificate and the statement of reasons for grant of the certificate.
